

ATTACHMENT 6

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

IN THE MATTER OF

VERIZON VIRGINIA INC.'S CASE NO. PUC-2002-00046
compliance with the
conditions set forth in
47 U.S.C. Section 271(c)

The complete transcript of the testimony
and other incidents of the above-captioned matter when
heard on June 19, 2002, before the Honorable Alexander
F. Skirpan, Jr., Hearing Examiner for the State
Corporation Commission, Richmond, Virginia.

Reported by:

Heidi L. Jeffreys

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1 APPEARANCES:

2
3 Honorable Alexander F. Skirpan, Jr.,
4 Hearing Examiner

5
6 Don R. Mueller, Esquire
7 Counsel for the Commission

8
9 Lydia R. Pulley, Esquire
10 David W. Ogburn, Jr., Esquire
11 William B. Petersen, Esquire
12 Deborah Haraldson, Esquire

13 and
14 William D. Smith, Esquire
15 Counsel for Verizon Virginia, Inc.

16
17 Mark A. Keffer, Esquire
18 Ivars V. Mellups, Esquire
19 and
20 Fredrick C. Pappalardo, Esquire
21 Counsel for AT&T Communications
22 of Virginia

23
24 Kimberly A. Wild, Esquire
25 Counsel for WorldCom, Inc.

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1 APPEARANCES (continued):

2
3 Cliona M. Robb, Esquire
4 and
5 E. Ford Stephens, Esquire
6 Counsel for Cox Virginia Telcom, Inc.

7
8 Alan M. Shoer, Esquire
9 Donald F. Lynch, III, Esquire
10 and
11 Stephen T. Perkins, Esquire
12 Counsel for Cavalier Telephone

13
14 Robert M. Gillespie, Esquire
15 Counsel for Virginia Cable
16 Telecommunications Association

17
18 Raymond L. Doggett, Jr., Esquire
19 Appearing on behalf of the Division
20 of Consumer Counsel, Office of the
21 Attorney General

22
23 Lawrence Freedman, Esquire
24 Counsel for OpenBand of Virginia,
25 L.L.C.

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1 APPEARANCES (continued):

2
3 Anthony Hansel, Esquire
4 Counsel for Covad Communications
5 Company

6
7 Mary McDermott, Esquire
8 Counsel for nTELOS

9
10 Robert E. Kelly, Esquire
11 Counsel for Allegiance Telecom of
12 Virginia, Inc.

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1 THE BAILIFF: All rise. The Commission
2 resumes the session.

3 Be seated, please.
4 HEARING EXAMINER: I think we were to Mr.
5 Doggett.

6 MR. HANSEL: I have one preliminary
7 matter.

8 HEARING EXAMINER: Sure.

9 MR. HANSEL: Covad witnesses are
10 unavailable tomorrow. I've spoken with Verizon, and
11 they have no conflict with perhaps trying to put them
12 in in the late afternoon today. Otherwise, they would
13 be available on Friday, but to the extent this
14 proceeding potentially will end tomorrow, you know,
15 I'd rather put them in later this afternoon than
16 request we extend the hearing.

17 HEARING EXAMINER: Well, being the
18 eternal optimist, we'll go ahead and put them on this
19 afternoon.

20 MR. HANSEL: Thank you.

21 MR. KELLY: Another preliminary matter.
22 I'm here, Robert E. Kelly, representing Allegiance
23 Telecom of Virginia, Inc.

24 HEARING EXAMINER: All right. Thank you.

25 MR. PAPPALARDO: Excuse me. Can we do

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1 migrations, voice migrations and data migrations. So
 2 it is a complicated topic and it is something that we
 3 need to work through as an industry.
 4 Q If a customer was to migrate from one
 5 CLEC to another CLEC, that information would be
 6 recorded in the Verizon systems, wouldn't it?
 7 A It depends upon the type of migration and
 8 the type of service.
 9 Q If it was a simple residential customer,
 10 assuming they use the same purchase of the UNE loop,
 11 would that information be tracked in a way that the
 12 double-billing team would have access to it?
 13 A A resale-to-resale migration or
 14 UNE-P-to-UNE-P or resale-to-UNE-P migration when it
 15 involves Verizon dial tone, then Verizon has a lot of
 16 that information in our records, yes. What we don't
 17 have in our records is the products and services that
 18 the CLEC has rendered to the end customer. We know
 19 what the CLECs have purchased from Verizon, but we
 20 don't necessarily know how that information is
 21 represented to the end customer and how it's being
 22 priced or represented to the end customer. So, we see
 23 the wholesale products that the CLEC has purchased
 24 from Verizon. We don't have any idea how they're
 25 representing that or charging their end customer for

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1 that.
 2 MR. DOGGETT: Thank you, Your Honor. I
 3 have no further questions.
 4 HEARING EXAMINER: Okay. Mr. Mueller?
 5 MR. MUELLER: None, Your Honor.
 6 HEARING EXAMINER: I have no questions
 7 for this panel. Any redirect?
 8 MS. HARALDSON: Yes, Your Honor, just two
 9 quick questions.
 10
 11 EXAMINATION
 12 BY MS. HARALDSON:
 13 Q. This is to Mr. Sullivan.
 14 Was the double-billing team established
 15 in November, 2000 or November, 2001?
 16 A. The double-billing team was established
 17 in November, 2000.
 18 Q. How many months, then, has that been in
 19 place?
 20 A. It's been a year and -- you're going to
 21 test me on my math now. About a year and a half.
 22 Q. Thank you very much.
 23 A. Certainly.
 24 MS. HARALDSON: Nothing further, Your
 25 Honor.

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1 HEARING EXAMINER: Okay. Thank you.
 2 This panel may be excused.
 3 * * * * *
 4 (Panel stood aside.)
 5 HEARING EXAMINER: Call your next one.
 6 MS. PULLEY: Your Honor, Verizon calls
 7 Rose Clayton, John White, Claire Beth Nogay, Maureen
 8 Davis, Tom Church, and Don Albert.
 9 These witnesses are the loop panel, which
 10 is checklist item number 4.
 11 Your Honor, I need to make one correction
 12 to the witnesses I just called. Instead of calling
 13 Tom Church, we're substituting Julie Canny.
 14 HEARING EXAMINER: Okay.
 15 MS. PULLEY: Thank you.
 16
 17 ROSEMARIE CLAYTON, JOHN WHITE, CLAIRE
 18 BETH NOGAY, MAUREEN DAVIS, JULIE CANNY and DONALD E.
 19 ALBERT, the Loops Panel, having first been duly sworn,
 20 testify as follows, viz:
 21
 22 EXAMINATION
 23 BY MR. SMITH:
 24 Q. Good morning.

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1 I would like each one of the panel
 2 members to please state their full name, their title,
 3 and give a brief description of their work
 4 responsibilities, starting with Ms. Nogay and working
 5 down the line?
 6 A. (Nogay) My name is Claire Beth Nogay,
 7 Vice President for CLEC Operations, Verizon South,
 8 which constitutes the geography for all the Potomac
 9 states, Pennsylvania, Delaware and New Jersey, and I'm
 10 responsible for provisioning all CLEC local services.
 11 (Davis) And my name is Maureen Davis.
 12 I'm the Executive Director for the National CLEC
 13 Maintenance Centers, and I have responsibility for the
 14 maintenance and repair of all resold and unbundled
 15 services.
 16 (White) My name is John White. I'm the
 17 Executive Director for Wholesale Technology, and I
 18 support all of the wholesale operations and all the
 19 CLEC issues when technology issues come up.
 20 A. (Clayton) My name is Rosemarie Clayton,
 21 Senior Product Manager for xDSLs and line sharing in
 22 the Verizon territory, and my responsibilities include
 23 product development to line sharing, conditioning and
 24 DSLs in general.
 25 (Albert) My name is Don Albert, Director

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1 of Network Engineering and, fortunately, my title and
 2 responsibilities are the same as they were on Monday.
 3 (Canny) I'm Julie Canny, the Executive
 4 Director to Verizon Wholesale Assurance. My
 5 responsibilities are development and performance
 6 assurance measures and remedies for all of Verizon.
 7 Q. Thank you. With respect to checklist
 8 item 4, did you or one of your colleagues prepare or
 9 have prepared prefiled testimony on this checklist
 10 item?
 11 (Collective) Yes.
 12 Q. Referring to the exhibit that has been
 13 marked Exhibit 1, is your direct testimony on this
 14 checklist item paragraphs 124 through 207, including
 15 the attachments referenced within those paragraphs?
 16 A. (Collective) Yes.
 17 Q. In referring to the exhibits that have
 18 been marked as 8 and 9A, is your reply testimony
 19 paragraphs 77 through 140, including the attachments
 20 referenced within those paragraphs?
 21 A. (Collective) Yes.
 22 Q. Thank you. Are there any additions or
 23 corrections that you would like to make to any of
 24 those paragraphs?
 25 A. (Clayton) I have a correction.

1 Q. What is that correction?
 2 A. The correction is to paragraph 130 of the
 3 checklist declaration, the second sentence, and it
 4 should read "During the year 2001, the volume of UNE-P
 5 combinations and stand-alone loops combined increased
 6 by approximately 130 percent."
 7 Q. Do you have any other corrections?
 8 A. No.
 9 Q. Thank you.
 10 Do you adopt those designated paragraphs
 11 with this one correction as your testimony on
 12 checklist item 4 in this case?
 13 A. (Collective) Yes.
 14 Q. Thank you.
 15 MR. SMITH: Before tendering the panel
 16 for cross-examination, we would like to ask a few
 17 direct questions to Ms. Clayton regarding the
 18 responsive supplemental testimony on electronic
 19 billing of Ms. Evans on behalf of Covad
 20 Telecommunications Company that raised issues related
 21 to loop and loop pricing.
 22 HEARING EXAMINER: Okay.
 23 BY MR. SMITH:
 24 Q. Ms. Clayton, are you familiar with this
 25 supplemental testimony I just referred to?

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1 A. (Clayton) Yes, I am.
 2 Q. Do you have it with you?
 3 A. Yes, I do.
 4 Q. Could you turn to paragraph 5 of that
 5 testimony?
 6 A. I've got it.
 7 Q. There's an allegation or allegations made
 8 in that paragraph stating that, "Contrary to Verizon's
 9 declaration that in no case will the new UNE rates be
 10 higher than the rates the CLECs are currently being
 11 billed, several of Verizon's charges are significantly
 12 higher than the charges currently in Covad's
 13 interconnection agreement with Verizon in the
 14 Commonwealth of Virginia."
 15 Do you see that allegation?
 16 A. Yes, I do.
 17 Q. Would you like to comment on that
 18 allegation?
 19 A. Yes, I would. Although the supplemental
 20 testimony focuses on electronic billing, there are
 21 allegations made in here by Covad that are inaccurate.
 22 All CLECs have the same rates, and they are the
 23 rates that are in the billing systems today, and the
 24 rates are higher than those that Covad has presented
 25 here, and they are the same rates that we filed with

1 the Commission in the March time frame of this year.
 2 Q. Thank you.
 3 A. You're welcome.
 4 Q. Ms. Clayton, are these rates in Covad's
 5 interconnection agreement?
 6 A. They are not in an existing
 7 interconnection agreement that I am aware of in
 8 Virginia today, no.
 9 Q. And what is the status of that
 10 interconnection agreement in Virginia today?
 11 A. The status is the interconnection
 12 agreement or the amendment itself is in limbo.
 13 Apparently, Covad was presented with the
 14 interconnection agreement; the agreement had never
 15 been signed.
 16 Q. Thank you.
 17 A. You're welcome.
 18 MR. SMITH: The panel is available for
 19 cross-examination.
 20 MR. SHOER: Thank you.
 21
 22 EXAMINATION
 23 BY MR. SHOER:
 24 Q. Good morning. My name is Alan Shoer. I
 25 represent Cavalier Telephone.

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1 your question.

2 Q. Are you aware that there were meetings
3 that took place at the FCC during the Pennsylvania 271
4 process where competitors were complaining about the
5 provisioning of DS1 loops in Virginia?

6 A. I'm generally aware of the complaints.
7 I'm not certain on the timing, you know, whether it
8 was during the Pennsylvania hearings or not. But I'm
9 generally aware that there were complaints, yes.

10 Q. And as I understand it, it's your
11 testimony that in the Pennsylvania 271 context, the
12 FCC was revealing the July, 2001 policy statement for
13 determination of Verizon's compliance with the
14 checklist requirements for 271, correct?

15 A. Right. They addressed this issue in the
16 Pennsylvania ruling and held that the policy that was
17 in place at the time was consistent with current FCC
18 rules.

19 Q. All right. At no point during that
20 review in the FCC did the FCC consider whether this
21 three, triplicate conversion order we described is
22 compliant with the checklist items for 271
23 application, did it?

24 A. I'm not aware of exactly what elements of
25 the policy they looked at. I think that what we

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1 looked at was the fact that we would build or would
2 not build, and the actual conversion, special access
3 to UNE conversion policy, I don't think was part of
4 that review.

5 Q. Now, going back to your analogy about
6 buying a dress, which you probably have more
7 experience with than I do --

8 A. Let's hope so.
9 (Laughter)

10 Q. I can state for sure that that's a fact.

11 Can you think of any circumstance where
12 that particular shop, that retail store, would request
13 you to place three separate requests, three separate
14 orders, for the same dress?

15 A. Not that I'm aware of, no.

16 Q. Would you agree with me that having a
17 competitor submit three separate requests for the
18 conversion ultimately to a UNE rate going forward
19 raises the competitor's processing costs, as compared
20 to just submitting one order?

21 A. I believe Verizon is in the process of
22 considering a single request process where a UNE
23 request is submitted, and if there are no facilities,
24 then not having the CLEC required to submit a second
25 one as a special access. I think those conversations,

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1 although I'm not totally up to speed on them -- I
2 think those kinds of process changes have begun to be
3 discussed.

4 Q. And can you provide us with what level in
5 Verizon's operations that discussion is going on?

6 A. I'd have to check on that.

7 Q. Does Verizon require its own retail
8 organization to submit three orders for the same DS1
9 capacity or DS1 service?

10 A. Well, it's not the same situation,
11 because retail customers are not ordering UNES,
12 they're ordering either special access or they're
13 ordering retail DS1s, and we build special access, and
14 we build for the retail side. We're not required to
15 build UNES.

16 Q. Does Verizon offer DS1 services to its
17 retail customers?

18 A. Yes.

19 (Albert) Maybe if I could just add a
20 little on your question of the three orders to do the
21 conversion.

22 At the time that we got long distance FCC
23 approval for Vermont and Rhode Island, that process
24 did exist there. You're talking about the UNE order,
25 then the special access order and then the UNE order.

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1 Q. That was available where, Mr. Albert?

2 A. Vermont and Rhode Island at the times
3 those were done.

4 Q. And in the Vermont and Rhode Island 271
5 review, was there a discussion or an examination of
6 that triplicate process for determination of checklist
7 compliance, do you know?

8 A. Not that I know of.

9 (Canny) It was discussed on the state
10 level and covered, I believe, in CLEC testimony.

11 Q. How about in the FCC determination?

12 A. The whole process was included as part of
13 their overall evaluation of our DS1 performance.

14 Q. How about the specific triplicate process
15 we've been talking about?

16 A. I'm not sure if that was specifically
17 mentioned.

18 Q. How long does it take Verizon to complete
19 a DS1 installation for its retail customer?

20 A. (Nogay) If there's no construction?

21 Q. Uh-huh.

22 A. I think the intervals for special access
23 are five-day firm-order confirmation periods -- you
24 know, I'm not exactly sure of the total, but it's
25 probably in the 10- to 13-day range for special

ATTACHMENT 7

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the complaint of)	
BRE COMMUNICATIONS, L.L.C., d/b/a)	
PHONE MICHIGAN, against AMERITECH)	Case No. U-11735
MICHIGAN for violations of the Michigan)	
Telecommunications Act.)	
_____)	

At the February 9, 1999 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On July 16, 1998, BRE Communications, L.L.C., d/b/a Phone Michigan, (BRE) filed a complaint against Ameritech Michigan, with prefiled testimony and exhibits. BRE alleged, among other things, that Ameritech Michigan violated their interconnection agreement by imposing special line construction charges, in addition to tariffed nonrecurring and recurring charges, for unbundled loops. Attempts to resolve the dispute through mediation, as provided for by Section 203a of the Michigan Telecommunications Act (MTA), MCL 484.2203a; MSA 22.1469(203a), were unsuccessful and contested case proceedings were initiated.

Pursuant to due notice, a prehearing conference was conducted on September 21, 1998 before Administrative Law Judge James N. Rigas (ALJ). In the course of that prehearing conference, the ALJ established a schedule for this case and denied the petition for leave to intervene filed by MCI Metro Access Transmission Services, Inc., and MCI Telecommunications Corporation (collectively, MCI). On September 28, 1998, MCI filed an application for leave to appeal the ALJ's ruling denying MCI's petition to intervene. On December 7, 1998, the Commission denied MCI's application for leave to appeal. Thus, only BRE, Ameritech Michigan, and the Commission Staff (Staff) participated in the proceedings.

An evidentiary hearing was conducted on November 12 and 13, 1998. Nine witnesses testified and 55 exhibits were received into evidence.¹ The transcript contains five volumes of testimony and argument covering 813 pages.

On November 25 and December 11, 1998, briefs and reply briefs were submitted by BRE, Ameritech Michigan, and the Staff, respectively.

On January 7, 1999, the ALJ issued his Proposal for Decision (PFD). On January 14, 1999, exceptions to the PFD were filed by BRE and Ameritech Michigan.² Replies to exceptions were filed by BRE, Ameritech Michigan³, and the Staff.

¹ Exhibits R-12 and R-13 were not admitted.

²On January 22, 1999, Ameritech Michigan submitted a corrected version of its exceptions. Because BRE and the Staff have not objected, the Commission finds that the corrected version of Ameritech Michigan's exceptions should be received.

³Ameritech Michigan's reply to exceptions was received for filing one day late. Under the circumstances, the Commission finds that Ameritech Michigan's reply to exceptions should be accepted.

II.

FACTS

BRE and Ameritech Michigan are competing providers of basic local exchange service in Michigan. In late 1996, Ameritech Michigan entered into negotiations with BRE that led to their execution of an interconnection agreement pursuant to the federal Telecommunications Act of 1996 (FTA), 47 USC 151 et seq. The interconnection agreement, which was signed on February 3, 1997, was approved by the Commission's June 5, 1997 order in Case No. U-11326 and appears in the record as Exhibit J-11.

In June 1997, BRE commenced offering basic local exchange service in Michigan through the acquisition of unbundled loops from Ameritech Michigan pursuant to Section 9.6.1 of the interconnection agreement.⁴ In most instances, when BRE has ordered an access line from Ameritech Michigan, it was provided without controversy.⁵ However, on 65 occasions that were documented prior to the filing of the complaint, Ameritech Michigan refused to provision access lines for BRE without imposition of special construction charges. These orders are contained in Exhibit C-21 and arranged in table format in Exhibit C-22. While the parties focus on these 65 orders, it is uncontested that Ameritech Michigan continued the practice of making special construction charge demands subsequent to the filing of the complaint.

⁴Section 9.6.1 specifies that BRE may request unbundled loops from Ameritech Michigan by submitting a valid electronic transmittal service order on Ameritech Michigan's electronic ordering system. Within 48 hours of Ameritech Michigan's receipt of a service order, Ameritech Michigan is obligated to provide BRE with a firm order commitment date by which the loop covered by the service order will be installed.

⁵As of the date of hearing, BRE had between 26,000 and 27,000 access lines in Michigan.

The 65 orders fit into two broad categories. The first group involves the incidents wherein BRE agreed to pay the special construction charges subject to its right under the interconnection agreement to dispute them at a later time. This group involves a collective amount of \$60,690.68 in special construction charges accrued as of the filing of the complaint.⁶

The second group involves the orders that were cancelled. It is BRE's position that, as of the date of the complaint, it had lost 15 customers having an aggregate of 85 access lines. BRE valued each of the access lines at \$29,971, which collectively amounts to a \$2.5 million loss.

The 65 orders⁷ may be categorized as follows:

Incidents as listed on Exhibit C-22.	General reasons for additional charges.
4/67, 18, 19, 23, 30, 66	Remote switching deployed as loop concentrator.
2, 8, 9, 11, 13, 17, 24, 29, 31, 32, 38, 46, 51, 54, 63	Integrated Digital Loop Carrier with no spare physical loop.
1, 3, 7, 10, 36, 37, 39, 41, 45, 52, 53, 62, 65	Request for conditioned high capacity digital loop.
5, 6, 12, 14, 15, 16, 20, 21, 22, 25, 26, 27, 28, 33, 34, 35, 40, 42, 43, 44/58, 47, 48, 49, 50, 55, 56, 57, 59, 60, 61, 64	Lack of facilities (resolved by dead lug throws, wire out of limits, etc.)

⁶Apparently, BRE has refused to pay any of the special construction charges to Ameritech Michigan.

⁷Because one of BRE's witnesses duplicated 2 of the orders and because 1 of Ameritech Michigan's witnesses also omitted several orders in categorizing them, the references to the number of orders fluctuates between 64 to 67. The Commission is persuaded that the correct number of orders is 65.

III.

POSITIONS OF THE PARTIES

BRE

To BRE, the key issue involves a determination of the circumstances under which an unbundled loop is available under the terms of the interconnection agreement or Ameritech Michigan's tariffs.⁸ BRE contends that a loop is available without imposition of a *special construction charge* whenever one of Ameritech Michigan's customers could obtain use of the loop without paying a special construction charge. According to BRE, a loop is unavailable only in a new, unassigned territory where facilities do not exist or when major facilities would have to be constructed.

Citing the Commission's October 2, 1998 order in Case No. U-11654, another complaint by BRE against Ameritech Michigan, BRE insists that the Commission previously addressed the issue of the availability of unbundled loops under the interconnection agreement and determined that a loop is unavailable "if it is located in an area not presently served by Ameritech Michigan, not when an area is served, but for some reason the order requires a field dispatch." Order, Case No. U-11654, p. 8.

BRE insists that in all 65 instances where Ameritech Michigan requested payment of special construction charges to provide unbundled loops, the loops must be considered to have been available at the time each order was received. According to BRE, the majority of the incidents involve situations where the tasks necessary to provide the loop involved a simple field dispatch for a dead lug throw, a splice, a wire out-of-limits, or other similar activity that Ameritech Michigan

⁸Section 9.4.2 of the interconnection agreement requires Ameritech Michigan to provision loops and ports "where such loops and ports are available." Under Ameritech Michigan's Tariff M.P.S.C. No. 20R, Part 19, Section 2, Sheet 1, loops under tariff may be obtained by carriers "where facilities are available."

routinely performs without charge to provide service to its own customers. As for the rest, BRE asserts that none of them are covered by Section 9.4.4 of the interconnection agreement, which indicates that Ameritech Michigan's provisioning of an unbundled loop through the demultiplexing of an integrated digitized loop may be accomplished only through use of the bona fide request (BFR) process described in the interconnection agreement. According to BRE, at no time did Ameritech Michigan notify BRE as required by Section 9.4.4 of the interconnection agreement that a spare physical loop was not available, which would have triggered BRE's option of submitting a BFR to Ameritech Michigan.

BRE also argues that digital loops are purchased out of Ameritech Michigan's tariff, which does not provide for special construction charges. Additionally, BRE maintains that allowance of the special construction charges in any of the 65 incidents will result in double recovery of costs by Ameritech Michigan because the rates approved by the Commission in the July 14, 1997 order in Case No. U-11280 already allow Ameritech Michigan to recover the costs of providing unbundled loops. In this regard, BRE contends that the total service long run incremental cost (TSLRIC) methodology embodied in the MTA specifically ignores the embedded network and focuses on long run, forward-looking costs. Accordingly, BRE argues that it would be inappropriate to allow Ameritech Michigan to recover any marginal costs associated with revision of its existing network to provision individual unbundled loops.

BRE maintains that Ameritech Michigan's practice of imposing special construction charges on BRE in situations where Ameritech Michigan does not charge its own retail customers for similar services constitutes unlawful discrimination under Sections 8.4 and 9.0 of the interconnection agreement, Section 355 of the MTA, MCL 484.2355, MSA 22.1469 (355), and Section 251(c)(3) of the FTA, 47 USC 251(c)(3). *BRE requests that the Commission order Ameritech Michigan to cease*

and desist from imposing special construction charges under similar circumstances in the future. It also requests the Commission to direct that Ameritech Michigan stop the practice of including language on its order forms that purports to require BRE to waive its rights to challenge special construction charges.

BRE also contends that under Section 601 of the MTA, MCL 484.2601; MSA 22.1469(601), it is entitled to damages for its economic losses. First, BRE requests that the Commission order *Ameritech Michigan* to cancel or to refund, if paid, the special construction charges imposed on the occasions where BRE approved the charges. Second, BRE states that in several situations the special construction charges were so high that they resulted in the cancellation of orders, which cost BRE a total of 15 customers representing 85 access lines. Asserting that the average value of one of its access lines was shown to be \$29,971, BRE maintains that its economic loss totals \$2,547,535 for the 85 lost access lines.⁹ BRE also contends that it suffered economic losses in the form of attorney fees, consultant fees, and the costs of bringing this action before the Commission. Accordingly, BRE asks that the Commission award it a reasonable amount for these costs. Finally, BRE requests that the Commission impose fines under Section 601 of the MTA of not less than \$1,000 nor more than \$20,000 per day for each day that Ameritech Michigan is found to have violated the MTA.

Ameritech Michigan

Ameritech Michigan insists that the Commission should dismiss BRE's complaint in its entirety. According to Ameritech Michigan, its provisioning of unbundled loops to BRE is fully consistent

⁹In the alternative, BRE suggests that the record also supports the award of economic damages on the basis of several lower per access line valuations.

with the letter and the spirit of their interconnection agreement. Ameritech Michigan argues that the interconnection agreement contemplates that it should be allowed to recover special construction charges from BRE in the situations covered by the 65 orders at issue in this proceeding, which represent only 1.15% of BRE's total unbundled loop orders.

Ameritech Michigan contends that an unbundled loop is only available within the meaning of the interconnection agreement if all required loop components exist in a contiguous fashion and provide a complete transmission path that can be assigned at the time that the loop request is processed. In other words, it is Ameritech Michigan's position that a loop is available if the required components already exist in a fully connected fashion, Ameritech Michigan describes as a connected through (CT) facility, or if all of the required contiguous components exist and are terminated at the appropriate outside plant interfaces so that the components can be connected by the simple dispatch of an Ameritech Michigan technician, the cost of which is covered by the normal line connection charge.

However, Ameritech Michigan maintains that if the loop components exist, but are not contiguous, the loop is not available within the meaning of the interconnection agreement because engineering or construction is involved, which necessitates the imposition of special construction charges. According to Ameritech Michigan, if a CT facility is not available to assign as an unbundled loop, Ameritech Michigan will endeavor to assemble a loop using existing, available component parts that are contiguous. However, if one or more of the required loop components do not exist or cannot be provisioned by a simple dispatch, pursuant to Sections 1.4 and 9.4.2 of the interconnection agreement, a loop is not available. While Ameritech Michigan is willing to provision an unbundled loop by assembling noncontiguous components, it insists that the extra engineering and construction intervention necessary to do so requires BRE to pay special construction charges.

Ameritech Michigan maintains that six of the orders involve situations where BRE's request for an unbundled loop involved remote switching. In each of those incidents, Ameritech Michigan maintains that BRE requested an unbundled loop in an area served by Ameritech Michigan's Saginaw main wire center. According to Ameritech Michigan, it provides service to its retail customers in that area through a remote switch deployed as a loop concentrator. In each case, there was no spare, existing physical loop. Ameritech Michigan contends that this situation requires the placement of a non-integrated digital loop carrier system between the remote location and the host central office to haul the unbundled loops back to the Saginaw main central office. Ameritech Michigan states that it quoted a charge of approximately \$28,000 to accomplish the required special construction in each instance because the orders were submitted separately. According to Ameritech Michigan, had BRE bundled these six orders, Ameritech Michigan would have quoted a charge of \$28,000 for the placement of the non-integrated digital loop carrier system for the initial loop with any additional loops costing only \$100 per loop.

Ameritech Michigan contends that 15 of the orders involve situations where the integrated digital loop carrier system had no spare physical loop available. According to Ameritech Michigan, Section 9.4.4 of the interconnection agreement specifically governs these situations. Ameritech Michigan states that if BRE requests an unbundled loop where the existing facility used to provide retail service to the end-user is served by an integrated digital loop carrier and there is no spare loop that could be used to provision the unbundled loop requested by BRE at no additional charge, Ameritech Michigan first attempts to move the end-user's service off of the integrated digital loop carrier system and to reconnect it to a non-integrated digital loop carrier system or to an existing copper facility that connects to the main distribution frame at the central office. If no such facilities are available, Ameritech Michigan will search for another existing Ameritech Michigan customer

that is served by a copper loop or a non-integrated digital loop carrier facility in the same area so that its customer can be transferred to the integrated digital loop carrier, which will free the copper loop for the non-integrated digital loop carrier facility for use by BRE's customers. Other potential solutions include using a Litespan integrated digital loop carrier system to provide the requested loop on a demultiplexed basis or to install a new, non-integrated digital loop carrier system to provision the unbundled loop in a demultiplexed fashion, which would cost approximately \$18,000 for the first unbundled loop and substantially less for each subsequent loop ordered by BRE.

According to Ameritech Michigan, 13 of the orders involved loop conditioning or requests for conditioned digital loops. According to Ameritech Michigan, these types of loops are not covered by the interconnection agreement and are provisioned in the manner described in its unbundled network element tariff, Tariff M.P.S.C. No. 20R, Part 19, Section 2. Ameritech Michigan states that the tariff requires the requesting carrier to pay for any special conditioning required for digital loops.

Ameritech Michigan maintains that the remainder of the orders involve situations where special construction charges were appropriate due to a lack of facilities. Further, Ameritech Michigan believes that a number of these situations could have been avoided had BRE coordinated unbundled loop orders with corresponding disconnect orders for the residential customers involved, which would have permitted Ameritech Michigan to reuse the existing loops without the necessity of provisioning a new loop. Indeed, Ameritech Michigan argues that if BRE is not required to absorb special construction charges under these circumstances, BRE will have no incentive to coordinate conversion requests with disconnect orders.

Ameritech Michigan also maintains that it has not discriminated against BRE. According to Ameritech Michigan, it is not appropriate to equate the provisioning of unbundled loops to com-

pecting local exchange carriers (CLECs) with Ameritech Michigan's service offerings to its own retail customers. Ameritech Michigan insists that the cost recovery for retail basic local exchange service is different from the cost recovery for provisioning of unbundled loops. Further, Ameritech Michigan argues that the Commission recognized in Case No. U-10647 that Ameritech Michigan must treat CLECs differently than its retail end-users, which demonstrates that a distinction exists between the provisioning of services to CLECs and retail customers.

Ameritech Michigan concedes that it is required to treat BRE and all other CLECs in the same manner that it treats itself. However, Ameritech Michigan argues that it is not required to treat CLECs in the same manner as it treats retail customers. Ameritech Michigan contends that it is only required to provide BRE with unbundled loops in the same manner that it provides such facilities to itself for the purpose of providing retail service to end-users. According to Ameritech Michigan, it is neither discriminatory nor unreasonable for Ameritech Michigan to recover special construction charges under Sections 9.4.2 and 9.4.4 of the interconnection agreement for only 1.15% of BRE's unbundled loop orders.

Ameritech Michigan also analogizes the situation to the essential facilities doctrine.¹⁰ Ameritech Michigan contends that if a facility does not exist, it cannot be considered essential, and is therefore unavailable. Moreover, Ameritech Michigan insists that nothing in the FTA or the MTA requires an incumbent local exchange carrier (ILEC) to construct new facilities for a CLEC without compensation.

¹⁰Under antitrust law, courts have recognized that when one dominant company controls a facility deemed essential for competition in a relevant market, the company with control over the facility may be obligated to provide its competitors with access to that facility, if feasible, on terms that are reasonable and nondiscriminatory. See, Olympia Equip Leasing Co v Western Union Telegraph Co, 797 F2d 370 (7CA 1986); Berkey Photo, Inc v Eastman Kodak Co, 603 F2d 263 (2CA 1979), cert don, 444 US 1093 (1980).

Ameritech Michigan also stresses that failure to adopt its interpretation of the interconnection agreement constitutes rejection of the cost causer doctrine.¹¹ Ameritech Michigan asserts that BRE should be required to bear the costs it causes in order to ensure *efficient investment incentives and correct risk assessments* regarding its decision to compete in the telecommunications marketplace as a facilities-based provider. Indeed, Ameritech Michigan contends that the cost causer doctrine is embodied in the FTA and the MTA, which was recognized by the Staff in Case No. U-10647.

Ameritech Michigan also contends that the special construction costs at issue are not already included in its current rates. According to Ameritech Michigan, its TSLRIC studies assume that the existing location of switches, facility routes, and the customer locations are fixed and that the technology that the costs are based upon is the least cost, most efficient technology available. Ameritech Michigan asserts that these costs reflect theoretical, broad, average, idealized perspectives and do not include special situations arising in real world situations. Accordingly, Ameritech Michigan maintains that when special situations arise, special construction charges are appropriate and necessary to capture extra costs from the cost causer.

With regard to the relief requested by BRE, Ameritech Michigan argues that the MTA does not grant the Commission authority to award monetary damages. In the alternative, Ameritech Michigan maintains that if BRE has the right to claim damages under Section 601 of the MTA, Ameritech Michigan is entitled to a jury trial as provided by Article I, Section 14 of the Michigan Constitution of 1963. In any event, Ameritech Michigan contends that BRE's claim for monetary damages is barred by the interconnection agreement. Citing Section 23.6 of the interconnection

¹¹The cost causer doctrine derives from the economic concept that society's resources should be allocated to their highest value, which occurs when prices are based on the cost caused by providing a particular service or element.

agreement, Ameritech Michigan maintains that indirect, special, consequential, incidental, and punitive damages, including anticipated profits or revenues and other economic losses, cannot be recovered by BRE. Ameritech Michigan also attacks the foundation for BRE's contention that it suffered economic losses. Ameritech Michigan asserts that BRE's witness on this issue lacked expertise to offer an opinion on the valuation of access lines. Ameritech Michigan further argues that the data relied on by BRE to support its damage claim lack probative value because there are substantial distinctions between BRE and the CLECs referenced in that data. Ameritech Michigan also criticizes BRE's calculation of its alleged damages due to its failure to account for unrealized costs or its obligation to mitigate damages. Finally, Ameritech Michigan contends that the Commission may not award attorney fees under Section 601 of the MTA.

The Staff

It is the Staff's position that Ameritech Michigan, as an ILEC, must provide nondiscriminatory service to CLECs of at least the same quality that it provides to itself. Citing Section 251(c)(3) of the FTA, 47 USC 251(c)(3), the Staff argues that Ameritech Michigan is prohibited from assessing special construction charges to BRE if, under similar circumstances, it does not assess such charges to its own customers. Moreover, the Staff insists that the Federal Communications Commission (FCC) has interpreted the FTA as requiring ILECs to provide efficient competitors with a meaningful opportunity to compete. According to the Staff, Ameritech Michigan's treatment of BRE does not constitute a meaningful opportunity to compete.

With regard to Ameritech Michigan's special construction tariff, which was submitted as Exhibit S-47, the Staff insists that special construction charges are only appropriate in very unique and highly unusual circumstances. It is the Staff's position that normal work that is required to

provide service to a customer should not be subject to these charges because the costs associated with such work are recovered in Ameritech Michigan's monthly recurring and nonrecurring charges for unbundled loops. Citing TSLRIC information submitted by Ameritech Michigan in Case No. U-11280, the Staff asserts that most, if not all, of the charges being imposed on BRE as special construction charges are routine costs already reflected in the costs and rates approved by the Commission. Further, in the event that some of the charges at issue are not reflected in the TSLRIC studies filed in Case No. U-11280, the Staff maintains that they nevertheless fail to meet the conditions set forth in Ameritech Michigan's special construction tariff.

The Staff also maintains that Ameritech Michigan's unbundled loop tariff and its interconnection agreement do not support the imposition of special construction charges. With respect to the unbundled loop tariff, the Staff states that special construction charges are appropriate for loop conditioning, but not for remote switching deployed as a loop concentrator, integrated digital loop carrier systems with no spare physical loop available, or lack of facilities. Further, citing Section 9.6.7 of the interconnection agreement, the Staff contends that only reasonable charges for labor may be assessed. Accordingly, the Staff concludes that there is no authority in Ameritech Michigan's loop tariff or the interconnection agreement to justify the special construction charges at issue in this proceeding.

The Staff recommends that the Commission direct Ameritech Michigan to cease and desist from imposing special construction charges under the conditions cited in the complaint, to stop requiring BRE to waive its rights to dispute special construction charges as a condition of provisioning loops,

to reimburse BRE for any special construction charges it may have paid, and to pay a fine of \$170,000¹²

IV.

PROPOSAL FOR DECISION

The ALJ first addressed the issue of the circumstances under which a loop is available within the meaning of the interconnection agreement and Ameritech Michigan's tariffs. Noting that *available is not specifically defined in either the interconnection agreement or Ameritech Michigan's Tariff M.P.S.C. No. 20R, Part 19, Section 2, Sheet 1*, the ALJ relied upon the Commission's discussion of the issue of availability in its October 2, 1998 order in Case No. U-11654, wherein the Commission stated:

The Commission agrees with the ALJ and the Staff that a loop is unavailable, within the meaning of that term in the interconnection agreement, if it is located in an area not presently served by Ameritech Michigan, not when the area is served, but for some reason the order requires a field dispatch. Unless the order requires a bona fide request for new or different facilities, the time for completion should be governed by the performance standards in Section 27.

Order, Case No. U-11654, p. 8.

Although acknowledging that the discussion in Case No. U-11654 concerned contract performance standards for installing unbundled loops, the ALJ found that the Commission's determination was directly relevant to this proceeding, which addresses the cost of installing unbundled loops.

The ALJ next found that the conditions contained in Ameritech Michigan's special construction tariff demonstrate that Ameritech Michigan is allowed to impose special construction charges

¹²The Staff suggests that a fine of \$2,000 for each of the 65 instances cited in the complaint would be appropriate. In addition, the Staff recommends a \$20,000 fine be imposed for Ameritech Michigan's violation of Section 305 of the MTA as well as another \$20,000 fine for its violation of Section 355.

in only very unique and highly unusual circumstances. In so doing, the ALJ agreed with BRE and the Staff that normal work required to provide service to a customer should not be subject to special construction charges. Further, he found that no unique or unusual circumstances were present in this proceeding to support the imposition of special construction charges. Indeed, the ALJ concluded that the construction charges at issue in this case are normal costs that properly belong in, and are reflected in, Ameritech Michigan's tariffed rates.

The ALJ also agreed with BRE and the Staff that Ameritech Michigan is obligated to treat CLECs as it treats itself. Accordingly, the ALJ determined that a loop is available as an unbundled loop, and not subject to special construction charges, if Ameritech Michigan can use the loop to connect one of its customers without imposing additional costs.

The ALJ was also persuaded that loops were available within the meaning of the interconnection agreement under all of the circumstances described in the 65 incidents shown on Exhibits C-21 and C-22 because the record established that Ameritech Michigan would have provided service to retail customers without imposing special construction charges.

The ALJ also agreed that the special construction charges assessed against BRE by Ameritech Michigan are also recovered in Ameritech Michigan's monthly recurring and nonrecurring charges for unbundled loops. In reaching this conclusion, the ALJ observed that Ameritech Michigan's TSLRIC studies approved in Case No. U-11280 determined the cost of providing unbundled loops on a long run, forward-looking basis. He also noted that the TSLRIC developed for unbundled network elements contemplated a wide range of circumstances and included all costs to prepare the investment for the provision of service to a customer. Furthermore, he concluded that the TSLRIC information demonstrated that most, if not all, of the special construction charges are routine types of costs already reflected in the costs and rates approved by the Commission. Further, the ALJ

expressed agreement with the Staff's position that if any of the components of the special construction costs are not already reflected in the TSLRIC studies filed in Case No. U-11280, then Ameritech Michigan's remedy is to revise the methodology used to identify its costs in its next biennial cost study.

Based on his findings, the ALJ concluded that Ameritech Michigan violated the interconnection agreement and the MTA by requiring BRE to pay special construction charges. The ALJ recommended that the Commission order Ameritech Michigan to cease and desist demanding special construction charges under similar circumstances in the future. Additionally, the ALJ found that Ameritech Michigan's requirement that BRE waive its right to dispute the special construction charges as a condition of provisioning loops violated the dispute resolution provision of the interconnection agreement. Accordingly, he also recommended that the Commission order Ameritech Michigan to cease and desist from requiring BRE to execute such waivers in the future.

With regard to the damages requested by BRE, the ALJ found that Section 601 of the MTA authorizes the Commission to fashion a monetary award that would make BRE whole for any economic losses that it may have suffered as a result of Ameritech Michigan's actions. While the ALJ concluded that the record did not support BRE's claim that it suffered an economic loss with respect to lost customers, he found that the Commission should order Ameritech Michigan to cancel any special construction charges that have not yet been paid and to order Ameritech Michigan to refund any charges already paid. In addition, the ALJ recommended that the Commission award BRE its attorney fees and costs for bringing this complaint. Finally, the ALJ recommended that the Commission impose a fine of \$170,000 as proposed by the Staff.